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No. 06-1104

Supreme Court, U.S.
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In The Supreme Court of the United States

OLGA OSTOPOSIDES, et al.,

Petitioners,

v.

RICHARD GLIMP, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Olga Ostoposides, Renna Ostoposides, Harry Ostoposides, and Socrates Ostoposides ("Ostoposides") argue they were deprived due process during the course of California Superior Court proceedings by virtue of a court order granting their attorney's request to be relieved from further representation of them. Their assertions arise in the context of a civil action alleging wrongful death based upon a theory of medical malpractice. While they were representing themselves, motions for summary judgment were granted resulting in judgment against them.

The Ostoposides have inaccurately asserted that they were deprived of the right to have attorney representation. In reality, they were not prevented by the Superior Court from having an attorney. Rather, the Ostoposides and their prior attorney failed to maintain a meaningful attorney-client relationship and, after that relationship ended, the Superior Court allowed the Ostoposides ample opportunity to retain counsel of their choosing, which they failed to accomplish.

As shown by the holdings of this Court, the petitioners as civil litigants, who have not had their liberty deprived, had no right to court appointed counsel. Their claim of indigency did not give rise to any right to have appointment of counsel. There is no right to State appointed counsel in an action such as this, alleging wrongful death as a result of medical malpractice.

The petitioners received appropriate notice of motions for summary judgment, against which they filed opposition papers. Those motions were properly granted based upon the absence of triable issues of material fact.

This action was initiated when petitioners, acting in pro per, filed their complaint in the Los Angeles Superior Court on November 20, 2000, alleging wrongful death action arising from medical malpractice. (CT[1] 33-41.) On June 28, 2001, petitioners retained attorney Lynn Moyer. (RT[2] 2:13-14.) Ms. Moyer propounded and responded to discovery, met with experts, attended and took depositions, served a new "doe" amendment, and dismissed 15 defendants. (Pet. App. A at p. 6a.)

On September 17, 2001, Ms. Moyer filed a motion to be relieved as counsel, declaring that she and Renna Ostoposides did "not see eye to eye on many matters," and that Renna continually refused to take her recommendations and advice, making her counsel ineffective. (CT 1120-1126.) Ms. Moyer further declared that Renna told her that she was fired after a disagreement over how to proceed with the case. (CT 1123:16-19.) The record indicates petitioners and Ms. Moyer disagreed on how to proceed with the case, leading to Renna Ostoposides telling Ms. Moyer that she was fired and that she needed a psychiatrist. (CT 1123:16-19.) Renna Ostoposides also refused to sign her deposition transcript and interfered with the other petitioners' signing of their deposition transcripts. (CT 1123:22-27; 1124:3-4.) Ms. Moyer stated that she could not ethically continue representing petitioners and stated her willingness to further detail in in-camera proceedings her reasons for withdrawing. (CT 1194:24-26.)

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[1] The Clerk's Transcript component of the record presented to the California Court of Appeal.

[2] The Reporter's Transcript component of the record presented to the California Court of Appeal.

In their petition, petitioners for the first time assert that Ms. Moyer demanded that they pay $20,000 to finance trial preparation if they wanted Ms. Moyer to continue to represent them.

At the hearing concerning the withdrawal of Ms. Moyer, on September 24, 2001, Judge Ramona See of the Superior Court acknowledged the breakdown of the attorney-client relationship, stating: "I don't see how you can go forward on a trial with an attorney that you can't even talk to." (RT A-3:7-8.) The order allowing Ms. Moyer to withdraw was an appropriate exercise of the court's discretion. (Pet. App. A at pp. 6a-8a.)

In connection with the order to relieve Ms. Moyer as counsel, Judge See made several orders to allow petitioners ample time to retain new counsel. The court ordered the summary judgment motions that had been set for hearing in October 2001 to be continued to hearing dates of February 11, 13, and 14, 2002. (RT A-11:7-8, A-14:26, A-15:2.) The trial date was continued from November 13, 2001 to March 14, 2002, with Judge See stating: "I'm going to give you a continuance so you can get new counsel on the case." (RT A-9:22-24, A-10:6-7, A-11:7-8, A-14:26, A-15:2; CT 1180.)

After the initial 30-day stay expired, on October 31, 2001, the Superior Court granted petitioners a second 30-day stay to "permit plaintiffs time to obtain new counsel." (CT 1232:21-22.) At this hearing, the court advised petitioners that it had set the case for trial in March, intentionally giving them "a lot of time" so that whoever came in as an attorney would have plenty of time to get ready and advised petitioners to "get going." (RT C-4:3-6, C-5:17-18.)

On December 3, 2001, the Superior Court granted another ex parte application to extend the stay, again based upon petitioners' request for more time to retain an attorney. (CT 1259-1270.)

On January 22, 2002, petitioners' third ex parte application for an order extending the stay and continuing the trial date was denied. (CT 1339-1640.)

Thereafter, petitioners forced a delay in proceedings by filing an appeal on January 22, 2002 challenging the order granting attorney Moyer's motion to be relieved as counsel and the Superior Court's January 22, 2002 order denying petitioners' motion to stay the proceedings and continue the trial date. (CT 1335-1338.) On January 31, 2002, the Superior Court stayed the action pending the outcome of the appeal, and set a status conference for March 1, 2002. (CT 1690-1691.) On February 20, 2002, the Court of Appeal dismissed the improvidently filed appeal in this matter. (CT 1938.)

At a March 1, 2002 status conference, the court acknowledged the dismissal of the appeal and set hearings for March 21, 2002 on the various defendants' motions for summary judgment and for a trial-setting conference. Prior to the appeal, the trial date had been set for March 14, 2002. Therefore, the Superior Court's order scheduling a trial-setting conference for March 21, 2002 implicitly continued the trial date. (CT 1938; RT G-2:14-24.)

On March 21, 2002, nearly six months from the date that Judge See granted Ms. Moyer's motion to be relieved, the court heard defendants' motions for summary judgment. In light of petitioners' failure to present evidence of medical malpractice and medical causation, the motions

for summary judgment were granted. (Pet. App. A at pp. 14a-20a; CT 1960-1987.)

Petitioners then appealed the judgment. The Court of Appeal affirmed the judgment on February 27, 2006. (Pet. App. A at 1a.) Appellants' petition for rehearing was denied on March 15, 2006. (Pet. App. A at 21a.) On May 17, 2006, Appellants' petition for review by the Supreme Court of California was denied. (Pet. App. A at 22a.) On August 30, 2006, Appellants submitted a petition to the United States Supreme Court.

REASONS FOR DENYING REVIEW

I. THE QUESTIONS PRESENTED DO NOT WARRANT REVIEW AS IT IS CLEAR THAT PETITIONERS WERE NOT DENIED THEIR RIGHT TO BE REPRESENTED BY COUNSEL AND THEY HAD NO RIGHT TO COURT APPOINTED COUNSEL.

Although a civil litigant may have a right to counsel, if the litigant chooses to be represented by counsel, the courts are not required to provide counsel or otherwise delay proceedings indefinitely to allow a civil litigant to find an attorney.

Petitioners challenge the decision of the Court of Appeal, in which that court stated:

> We know of no authority which even suggests a plaintiff in a medical malpractice case is entitled to be represented by counsel, and no such case has been cited by appellants. But even

> if we assume the constitutional provisions are applicable to a civil case, there was no due process violation here. (See *People v. $30,000 United States Currency* (1995) 35 Cal.App.4th 936, 942, *Iraheta v. Superior Court* (1999) 70 Cal.App.4th 1500, 1503; *Fallis v. Dept. of Motor Vehicles* (1968) 264 Cal.App.2d 373, 383 ["In its narrowest definition, [the right to be represented by counsel] is the right to appear by counsel in any adversary proceeding in which the adversary party has the benefit of or the right to counsel"]; *Mendoza v. Small Claims Court* (1958) 49 Cal.2d 668, 673; cf. *Vann v. Shilleh* [(1975)] 54 Cal.App.3d [192,] at p. 200.) (Pet. App. A at p. 9a.)

Petitioners fail to discuss the rest of the Court of Appeal's discussion on this point, in which it stated:

> Here, the record discloses no due process violation. Appellants were not deprived of their rights to a fair hearing. As explained above, appellants contention that attorney Moyer was permitted to withdraw "on the eve of trial," is misplaced.
>
> Contrary to appellants' argument, they failed to present evidence demonstrating that "*no attorney* could take the case because of the pending trial date." (Italics added [by Court].) The declaration of Renna Ostoposides and attorney Russell Behjatnia are unhelpful. Only one attorney, John Eberlein, declared on January 18, 2002, that he could not take the case in part because of the upcoming trial date.
>
> Appellants also presented no evidence of their "extensive efforts" to locate an attorney,

> Renna states that they conducted a "diligent" search, but her declaration lacks any details such as the number of attorneys contacted and when they were first contacted. In any event, the court had accommodated the problem by granting numerous continuances and stays of proceedings.
>
> Under these circumstances, appellants were not deprived of a fair hearing. (Pet. App. A at pp. 9a-10a.)

As the Court of Appeal recognized, petitioners were not left without counsel "on the eve of trial." Ms. Moyer's application to withdraw was nearly two months before the then scheduled trial date, and the Superior Court continued the trial another four months, putting trial nearly six months away at that time. (Pet. App. A at pp. 7a-8a.)

Petitioners cite *Powell v. Alabama,* 287 U.S. 45 (1932), in support of their argument that the lower courts failed to follow this Court's precedent. However, that was a criminal case wherein the defendants were accused of criminal assault based upon a fight during which some victims were thrown off a train. (*Id.* at 50-51.) Petitioners focus upon the language of the opinion stating:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. (*Id.* at 69.)

In making their arguments, petitioners ignore the clear meaning of this statement – it would violate due process of a civil or criminal litigant if the court refused to allow an attorney retained by the litigant to act on the litigant's behalf in court proceedings. Clearly, that did not occur here.

Further, petitioners ignore the aspect of the opinion limiting the scope of the holding to criminal capital cases. (*Id.* at 71-72.)

Petitioners failed to cite the momentous decision in *Gideon v. Wainwright,* 372 U.S. 335 (1963), wherein this Court analyzed its precedents, including *Powell*, and laid down a rule that assures appointment of counsel in criminal proceedings, and stating:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. (*Id.* at 344.)

Although overruled on other grounds in *Gideon*, in *Betts v. Brady,* 316 U.S. 455 (1942), this Court rejected out of hand even the thought that the due process clause could be interpreted to require "the furnishing of counsel in civil cases involving property." (*Id.* at 473.)

The right to government appointed counsel is premised upon a person's risk of loss of personal liberty. This Court has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not result in the defendant's loss of personal liberty. In *Scott v. Illinois,* 440 U.S. 367 (1979), the Court held that

> [T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense. (*Id.* at 373-374.)

In *Lassiter v. Dep't of Social Services,* 452 U.S. 18 (1981), this Court surveyed its holdings and stated:

> In sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured. (*Id.* at 26-27.)

In *Lassiter* this Court summarized its holding in *Mathews v. Eldridge,* 424 U.S. 319 (1976), as propounding:

> [T]hree elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight

> in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom. (*Lassiter* at 27.)

In *Lassiter* the Court concluded that the Due Process Clause did not require the appointment of counsel when a State "seeks to terminate an indigent's parental status." (*Id.* at 33.)

There is simply no indication in this Court's precedents that the Fourteenth Amendment would require court appointment of counsel in a civil action for wrongful death based upon allegations of medical malpractice, as suggested by petitioners.

II. PETITIONERS' ARGUMENTS REGARDING ACCESS TO COURTS AS INDIGENTS DO NOT WARRANT REVIEW BY THIS COURT.

Petitioners' references to statutory rights to access to federal courts in Forma Pauperis pursuant to 28 USC § 1915, and the application of that statute in *Adkins v. E.I. Dupont de Nemours & Co.*, 335 U.S. 331 (1948), are inapposite. In *Adkins*, the issues were the scope and application of § 1915, "which authorizes a citizen to prosecute or defend actions in federal courts 'without being required to prepay fees or costs or for the printing of the record in the appellate court . . . upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal, or to give security for the same, . . .'"

Adkins does not help petitioners for two reasons. First of all, this action was not litigated in federal court.

Second, petitioners have made no showing that they were deprived of access to the courts by virtue of their inability to pay a filing fee or other litigation costs.

There is nothing in the statute or *Adkins* suggesting an obligation of a State to appoint counsel in a civil case, such as the one litigated by petitioners herein.

CONCLUSION

Although the Ostoposides' sense of loss as a result of the death of their loved one is understandable, this petition is a misguided effort on their part to prolong litigation of a case in which there was a just determination of their claim. They have failed to raise any issue deserving of this Court's attention.

They have no right to court appointed counsel in this civil litigation, and no right derives from their assertion of indigency. They had ample opportunity to find and retain counsel. They were never deprived access to the courts as a result of indigency.

This Court should deny the Ostoposides' petition.

Dated: March 12, 2007

Respectfully submitted,

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